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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/697,804	10/31/2003	Scott K. Brown	06975-450001	1159
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MINNEAPOLIS, MN 55440-1022				
EXAMINER				
SWEARINGEN, JEFFREY R				
ART UNIT		PAPER NUMBER		
2445				
NOTIFICATION DATE		DELIVERY MODE		
12/19/2008		ELECTRONIC		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

PATDOCTC@fr.com

### Office Action Summary

**Application No.**

10/697,804

**Applicant(s)**

BROWN ET AL.

**Examiner**

Jeffrey R. Swearingen

**Art Unit**

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**Period for Reply** -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 30 June 2008.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-37 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-37 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 31 October 2003 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-8508)
- Paper No(s)/Mail Date \_\_\_\_\_

- 4) ☐ Interview Summary (PTO-413)
- Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

### DETAILED ACTION

1. This case is reassigned to a new Examiner.

#### ***Response to Arguments***

2. Applicant's arguments with respect to claims 1-37 have been considered but are moot in view of the new ground(s) of rejection.

#### ***Claim Rejections - 35 USC § 102***

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

4. Claims 1-6, 8-24, 26-37 are rejected under 35 U.S.C. 102(e) as being anticipated by Auerbach (US 6,832,253).

5. In regard to claim 1, 19, 37, Auerbach disclosed:

*receiving an instruction indicating a client request to access content; column 6, line 28*  
*accessing, on a client, a list of content sources capable of rendering the content for which access*  
*is requested by the client; column 7, lines 18-30*

*requesting the content from each of the content sources in the list of the content sources; column*  
*7, lines 31-40*

*determining, based on requesting the content, a performance metric describing an ability for the*  
*content source to support the client as measured by the client for at least two of the content sources; and*  
*column 7, lines 31-55*

*selecting among the content sources based on the performance metric to identify a content*  
*source to be accessed by the client in response to determining the performance metric for at least two of*  
*the content sources. Column 7, lines 56-62*

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6. In regard to claim 2, 20, Auerbach disclosed:  
*accessing the content source selected. Column 7, lines 61-62*
  7. In regard to claim 3, 21, Auerbach disclosed:  
*monitoring communications exchanged with the content source selected to determine a selected connection state to determine if an alternate content source should be accessed. Column 12, lines 4-26*
  8. In regard to claim 4, 22, Auerbach disclosed:  
*repeating the determining and selecting when the selected connection state indicates that the alternate content source should be accessed. Column 7, lines 56-62*
  9. In regard to claim 5, 23, Auerbach disclosed:  
*monitoring the state of at least one of the content sources not selected from within the list of content sources so that the alternate content source may be selected when the connection state indicates the alternate content source should be accessed. column 12, lines 4-26*
  10. In regard to claim 6, 24, Auerbach disclosed:  
*receiving the list of content sources from a host. Column 7, lines 18-30*
  11. In regard to claim 7, 25, Auerbach disclosed:  
*the list of content sources is received in response to authenticating.*
  12. In regard to claim 8, 26, Auerbach disclosed:  
*polling at least two of the content sources with a polling request. Column 12, lines 4-26*
  13. In regard to claim 9, 27, Auerbach disclosed:  
*transmitting a stream request to each of the content sources in the list of content sources.*
- Column 6, line 28
14. In regard to claim 10, 28, Auerbach disclosed:  
*identifying a first content source with a response to the polling request that is received before other responses from other content sources included in the list of content sources. Column 9, lines 25-40*
  15. In regard to claim 11, 29, Auerbach disclosed:  
*identifying a first content source able to sustain an identified throughput rate. Column 8, line 24*
  16. In regard to claim 12, 30, Auerbach disclosed:

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*identifying the first content source able to sustain the identified throughput rate for a specified duration.* Column 8, lines 16-35

17. In regard to claim 13, 31, Auerbach disclosed:

*identifying the content source with a highest throughput rate.* Column 8, line 24

18. In regard to claim 14, 32, Auerbach disclosed:

*ranking at least two of the content sources.* Column 7, lines 56-62

19. In regard to claim 15, 33, Auerbach disclosed:

*using the ranking to select a backup content source to be accessed when the content source selected for access experiences an interrupt condition.* Column 7, lines 56-62

20. In regard to claim 16, 34, Auerbach disclosed:

*ranking among at least two of the content sources not selected by transmitting subsequent polling requests to the content sources not selected.* Column 12, lines 4-26

21. In regard to claim 17, 35, Auerbach disclosed:

*establishing and maintaining a connection to one or more of the content sources not selected from among the list while accessing the content source selected.* Column 9, lines 25-50.

22. In regard to claim 18, 36, Auerbach disclosed:

*switching to one of the content sources not selected from the list when access to the content source selected is determined to be inferior to access available using the content source that is accessed.*  
Column 7, lines 56-62

***Claim Rejections - 35 USC § 103***

23. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

24. Claims 7 and 25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Auerbach in view of Astarabadi et al. (US 6,910,064).

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25. In regard to claims 7 and 25, Auerbach failed to disclose using server authentication. Astarabadi, column 4, lines 51-59 discloses the common practice in the art of using authentication to allow only those with an account or access rights to access a server. It would have been obvious to one of ordinary skill in the art at the time of invention to use server authentication with Auerbach since Auerbach was directed toward accessing content over a server network and security in a server network is a common place feature to prevent hackers, unauthorized access of content, keep trade secrets, avoid bandwidth overload, or any other myriad reasons to put a password on a server network.

***Conclusion***

26. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.
27. Swildens et al. US 6,754,699
28. Sim US 6,970,939
29. Hrastar et al. US 6,286,058
30. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jeffrey R. Swearingen whose telephone number is (571)272-3921. The examiner can normally be reached on M-F 8:30-5:00.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Larry Donaghue can be reached on 571-272-3933. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Jeffrey R. Swearingen  
Examiner  
Art Unit 2445

/J. R. S./  
Examiner, Art Unit 2445

/Larry D Donaghue/  
Primary Examiner, Art Unit 2454